

# **Administrative Hearing Commission**

## **Attorney Fees Statutes And Discovery Rules**

(Part II)

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## **RULE 57. INTERROGATORIES AND DEPOSITIONS**

### **RULE 57.01 INTERROGATORIES TO PARTIES**

**(a) Availability; Procedures for Use.** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and petition upon that party. At the time of service upon the party who is to answer the interrogatories, the interrogating party also shall serve a copy, along with a notice stating the name and address of the party who is to answer, upon each additional party, if any.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in detail in lieu of an answer. The answers are to be signed by the person making them, and the objections are to be signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers and objections, if any, upon the interrogating party and upon each additional party, if any, within thirty days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and petition upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatory may move for an order under Rule 61.01(b) with respect to any objection to or other failure to answer an interrogatory.

**(b) Filing.** Interrogatories and answers under this Rule 57.01 shall not be filed with the court except upon court order or contemporaneously with a motion placing the interrogatories in issue. However, both when the interrogatories and answers are served, the party serving them shall file with the court a certificate of service. The certificate shall show the caption of the case, the name of the party served, the date and manner of service, the designation of the document, e.g., first interrogatories or answers to second interrogatories, and the signature of the serving party or attorney. Each party filing a certificate shall maintain a copy of the document that is

the subject of the certificate until the case is finally disposed.

**(c) Scope; Use at Trial.** Interrogatories may relate to any matters which can be inquired into under Rule 56.01, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

**(d) Option to Produce Business Records.** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

## **RULE 57.02 DEPOSITIONS BEFORE ACTION OR PENDING APPEAL**

### **(a) Before Action.**

(1) *Petition.* A person who desires to perpetuate testimony of any person regarding any matter that may be cognizable in any court of Missouri may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be captioned in the name of the petitioner and shall show: (1) that the petitioner expects to be a party to an action cognizable in a court of Missouri but is presently unable to bring it or cause it to be brought, (2) the subject matter of the expected action and the petitioner's interest therein, (3) the facts desired to be established by the proposed testimony and the reasons for desiring to perpetuate it, (4) the names or a description of the persons expected to be adverse parties and their addresses so far as known, and (5) the names and addresses of the persons to be examined and the substance of the testimony that is expected to be elicited from each.

The petitioner shall ask for an order authorizing the taking of the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least thirty days before the date of hearing, the notice shall be served either within or without the state in the manner provided for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise and shall appoint, for persons not personally served with a summons in this state, an attorney who shall represent them and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 52.02 apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these Rules; and the court may make orders of the kind provided for by Rules 58.01 and 60.01. For the purpose of applying these Rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be considered as referring to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these Rules, it may be used in any action involving the same subject matter subsequently brought in a court of Missouri, in accordance with the provisions of Rule 57.07.

(b) **Pending Appeal.** If an appeal has been taken from a judgment of a circuit court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the circuit court. In such case, the party who desires to

perpetuate the testimony may make a motion in the circuit court for leave to take the depositions, upon the same notice and service thereof as if the action were pending in that court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony expected to be elicited from each and (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the deposition to be taken and may make orders of the character provided for in Rule 58.01 and Rule 60.01, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in action pending in that court.

(c) **Perpetuation by Action.** This Rule does not limit the power of a court to entertain an action to perpetuate testimony.

## **RULE 57.03 DEPOSITIONS UPON ORAL EXAMINATION**

(a) **When Depositions May Be Taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and petition upon any defendant, except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery. The attendance of witnesses may be compelled by subpoena as provided in Rule 57.09. The attendance of a party is compelled by notice as provided in subdivision (b) of this Rule. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court describes.

(b) **Notice of Examination: General Requirements; Special Notice; Production of Documents and Things; Deposition of Organization.**

(1) A party desiring to take the deposition of any person upon oral examination shall give not less than seven days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of

the materials to be produced as set forth in the subpoena shall be attached to or included in the notice. A party may attend a deposition by telephone.

(2) The court may for cause shown enlarge or shorten the time for taking the deposition.

(3) The notice to a party deponent may be accompanied by a request made in compliance with Rule 58.01 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 58.01 shall apply to the request.

(4) A party may in the notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This Rule 57.03(b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

(5) When the party causing a deposition or depositions to be taken under a notice shall have completed the taking thereof, any other party may, before the same or any other officer authorized to take depositions, and at the same place, proceed immediately, or on the next day, to take any depositions the party may desire to be taken in the civil action, and may continue the taking thereof from day to day, at said place, until the party shall have taken all the party desires; but to do so, the party shall, before or during the time of the taking of the depositions on behalf of the other party, give all other parties, or the attorneys representing them, notice in writing of the intention to do so, the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

**(c) Non-Stenographic Recording—Video Tape.** Depositions may be recorded by the use of video tape or similar methods. The recording of the deposition by

video tape shall be in addition to a usual recording and transcription method unless the parties otherwise agree.

(1) If the deposition is to be recorded by video tape, every notice or subpoena for the taking of the deposition shall state that it is to be video taped and shall state the name, address and employer of the recording technician. If a party upon whom notice for the taking of a deposition has been served desires to have the testimony additionally recorded by other than stenographic means, that party shall serve notice on the opposing party and the witness that the proceedings are to be video taped. Such notice must be served not less than three days prior to the date designated in the original notice for the taking of the depositions and shall state the name, address and employer of the recording technician.

(2) Where the deposition has been recorded only by video tape and if the witness and parties do not waive signature, a written transcription of the audio shall be prepared to be submitted to the witness for signature as provided in Rule 57.03(f).

(3) The witness being deposed shall be sworn as a witness on camera by an authorized person.

(4) More than one camera may be used, either in sequence or simultaneously.

(5) The attorney for the party requesting the video taping of the deposition shall take custody of and be responsible for the safeguarding of the video tape and shall, upon request, permit the viewing thereof by the opposing party and if requested, shall provide a copy of the video tape at the cost of the requesting party.

(6) Unless otherwise stipulated to by the parties, the expense of video taping is to be borne by the party utilizing it and shall not be taxed as costs.

**(d) Record of Examination; Oath; Objections.** The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 57.03(c). If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or any other objection to the proceedings shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to

the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition, and that party shall transmit them to the officer before whom the deposition is to be taken, who shall propound them to the witness, and the questions and answers thereto shall be recorded.

**(e) Motion to Terminate or Limit Examination.**

At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or a court having general jurisdiction in the place where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 56.01(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 61.01(g) apply to the award of expenses incurred in relation to the motion.

**(f) Submission to Witness; Changes; Signing.**

When the testimony is fully transcribed, the deposition shall be submitted by the officer to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them; provided, however, that the answers or responses as originally given, together with the changes made and reasons given therefor, shall be considered as a part of the deposition. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found, or is dead or refuses to sign. If the deposition is not signed by the witness, the officer shall sign it and state on the record the fact of the waiver or of the illness, or death or absence of the witness or the fact of the refusal to sign together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress, the court holds that the reasons given for the refusal to



sign require rejection of the deposition in whole or in part.

**(g) Certification, Delivery, and Filing; Exhibits; Copies.**

(1) *Certification and Delivery.* The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Upon payment of reasonable charges therefor, the officer shall deliver the deposition to the party who requested that the testimony be transcribed.

(2) *Filing.*

(a) By the Officer. Upon delivery of a deposition, the officer shall file with the court a certificate showing the caption of the case, the name of the deponent, the date the deposition was taken, the name and address of the person having custody of the original deposition, and whether the charges have been paid. The officer shall not file a copy of the deposition with the court except upon court order.

(b) By a Party. A party shall not file a deposition with the court except upon specific court order or contemporaneously with a motion placing the deposition or a part thereof in issue. The court may enact local court rules requiring a party who intends to use a deposition at a hearing or trial to file that deposition with the court on or prior to the date of the hearing or trial.

(c) Return of Deposition. At the conclusion of the hearing or trial the deposition that has been filed or delivered to the court shall be returned to the party that filed or delivered the deposition.

(d) Retention of Deposition. At the conclusion of the hearing or trial the deposition that has been filed or delivered to the court shall be returned to the party that filed or delivered the deposition.

(d) Retention of Deposition. The original deposition shall be maintained until the case is finally disposed.

(3) *Exhibits.* Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification if the person affords to all parties fair opportunity to verify the copies by comparison with the originals and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person

producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court pending final disposition of the civil action.

(4) *Copies.* Upon request and payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

**(h) Failure to Attend or to Serve Subpoena; Expenses.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving notice to pay to such other party the reasonable expenses incurred by that other party and that other party's attorney in attending, including reasonable attorney's fees.

(2) If a witness fails to appear for a deposition and the party giving the notice of the taking of the deposition has not complied with these rules to compel the attendance of the witness, the court may order the party giving the notice to pay to any party attending in person or by attorney the reasonable expenses incurred by that other party and that other party's attorney in attending, including reasonable attorney's fees.

**RULE 57.04 DEPOSITIONS UPON WRITTEN QUESTIONS**

**(a) Serving Questions; Notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 57.09. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating: (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 57.03(b)(4).

Within thirty days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within ten days after being served with cross questions, a party may serve redirect questions upon all other parties. Within ten days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

**(b) Officer to Take Responses and Prepare Record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 57.03(d), (f), and (g), to take the testimony of the witness in response to the questions and to prepare, certify, and deliver the deposition, attaching thereto the copy of the notice and the questions.

**(c) Notice of Delivery.** When the deposition is delivered, the party taking it promptly shall give notice thereof to all other parties.

#### **RULE 57.05 PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN**

**(a) In Missouri.** Within the State of Missouri, depositions shall be taken before an officer authorized by the laws of this State to administer oaths, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

**(b) Elsewhere in the United States.** Within other States of the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

**(c) In Foreign Countries. In a foreign country, a deposition may be taken:**

(1) On notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or

(2) Before a person commissioned by the court, and a person so commissioned has the power by virtue of his commission to administer any necessary oath and take testimony, or

(3) *Pursuant to a Letter Rogatory.* A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed To the Appropriate Authority in [here name the country]. Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these Rules.

(d) **Disqualification for Interest.** No deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

#### **RULE 57.06 COMMISSIONER FOR DEPOSITION**

(a) **Commissioner May Be Appointed–Qualifications.** The court, upon motion, may appoint a commissioner to preside at the taking of a deposition. The commissioner shall be a member of the Missouri Bar.

(b) **Authority of Commissioner.** The commissioner in addition to the authority conferred on officers to take depositions shall have the authority to determine all objections to evidence and to exclude evidence with is not within the scope of discovery as defined in Rule 56.01(b).

(c) **Report to Court on Rulings by Commissioners.** Upon request of a party the commissioner shall report a ruling or rulings on evidence to the court either during or after the completion of the taking of a deposition.